No. 22,165

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETER ANTHONY NOGA,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF AND APPENDIX FOR THE APPELLEE

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JURISDICTIONAL STATEMENT

This action was instituted in the district court by the appellant pursuant to the Federal Tort Claims Act, 28 U.S.C. 1346(b), to recover for injuries he sustained allegedly due to the improper driving of a government employee (R. 1-3). The district court granted the government's motion for summary judgment and dismissed the complaint on the ground that appellant's exclusive remedy against the United States lay

under the Federal Employees' Compensation Act, 5 U.S.C. (Supp. II) 8101 et seq. (R. 96-100). The jurisdiction of this Court rests on 28 U.S.C. 1291.

COUNTERSTATEMENT OF THE CASE

On August 22, 1966, appellant Noga brought suit in the United States District Court for the Northern District of California, pursuant to the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 et seq. (R. 1-3). In his complaint Noga alleged that he was injured while riding as a passenger in an automobile driven by one Dennis Bruce, a government employee, who assertedly was in the scope of his government employment. Noga sought judgment of $1,000,000 from the United States.

On December 22, 1966, the United States moved for summary judgment (R. 10-12). In support of that motion the Assistant United States Attorney submitted an affidavit in which he asserted that Noga at the time of the accident was a government employee, and that he had filed a claim under the Federal Employees' Compensation Act which had been approved by the Bureau of Employees' Compensation (R. 11-12).[1/] The government contended that Noga's remedy under the F.E.C.A. was exclusive (5 U.S.C. 757(b)), and that his suit under the Tort Claims Act could not be maintained.

1/ The affidavit indicated that Noga was paid a sum of $4,189.61 for the period of August 25, 1964, through July 31, 1966. It was further asserted that the minimum rate for total disability beginning August 1, 1966, was $56.61 per week, and that Noga was currently receiving that amount or more under the Act.

That motion was opposed on the ground that the Federal Drivers Act, 28 U.S.C. 2679(b)-(e), took away Noga's right of recovery against Bruce, who assertedly was driving in the scope of his employment, and that thus he should be given a complete judicial remedy against the United States (R. 16-23).

On July 6, 1967, the district court accepted the government's position that the F.E.C.A. was Noga's exclusive remedy against the United States (R. 96-99, 272 F. Supp. 51). The government's motion for summary judgment was granted by order entered August 2, 1967 (R. 100).

This appeal followed (R. 101).

STATUTES INVOLVED

28 U.S.C. 1346(b) provides in pertinent part:

> (b) Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

The Federal Drivers Act, 28 U.S.C. 2679(b)-(e) provides in pertinent part:

Subsection (b), 28 U.S.C. 2679(b):

> The remedy by suit against the United States as provided by section 1346(b) of this title for damage to property or for personal

injury, including death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

Subsection (c), 28 U.S.C. 2679(c):

The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States Attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

Subsection (d), 28 U.S.C. 2679(d):

Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.

The Federal Employees' Compensation Act, 5 U.S.C. 751 et seq. (now 5 U.S.C. (Supp. II) 8101 et seq.) provides in pertinent part (Section 757(b)): [2/]

> The liability of the United States or any of its instrumentalities under sections 751-756, 757-781, 783-791 and 793 of this title or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute: Provided, however, That this subsection shall not apply to a master or a member of the crew of any vessel.

SUMMARY OF ARGUMENT

The district court correctly held that appellant, who was eligible for and has received benefits under the Federal Employees' Compensation Act, may not recover tort damages from the United States under the Federal Tort Claims Act. The exclusivity provision of the Federal Employees' Compensation Act expressly provides that Noga's remedy under the F.E.C.A. shall be exclusive of any liability of the United States under "any

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2/ Title 5 of the United States Code has been recodified, and the F.E.C.A. is now found at 5 U.S.C. (Supp. II) 8101 et seq. 5 U.S.C. 757(b), with minor modifications, is now found at 5 U.S.C. (Supp. II) 8116(c).

Federal tort liability statute." Moreover, the courts have consistently held that the F.E.C.A. is a government employee's exclusive remedy against the United States.

Nor does the Federal Drivers Act, 28 U.S.C. 2679(b)-(e) affect the exclusivity of the F.E.C.A. The exclusivity provision fully applies even where plaintiff has no tort remedy against the government driver individually.

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT APPELLANT, WHO IS ELIGIBLE FOR AND HAS RECEIVED BENEFITS UNDER THE F.E.C.A., CANNOT MAINTAIN AN ACTION AGAINST THE UNITED STATES UNDER THE TORT CLAIMS ACT.

It is undisputed that appellant, who was a Government employee at the time of his accident, was eligible for, and has received, a compensation award under the Federal Employees' Compensation Act, 5 U.S.C. 751 et seq., R. 11, 23; Appellant's Brief p. 2. He cannot, therefore, obtain damages from the United States under the Tort Claims Act.

5 U.S.C. 757(b) [3/] expressly makes Noga's remedy under the F.E.C.A. "exclusive, and in place, of all other liability of the United States * * * to the employee * * * on account of such injury * * * in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute* * *" (Emphasis added.) The courts have consistently held that the remedy provided to a Government employee by the F.E.C.A. is his exclusive remedy against the United States: Johansen v. United States, 343 U.S. 427; Patterson v. United States, 359 U.S.

3/ 5 U.S.C. (Supp. II) 8116(c), as recodified.

495; Posegate v. United States, 288 F. 2d 11 (C.A. 9), certiorari denied, 368 U.S. 832; Balancio v. United States, 267 F. 2d 135 (C.A. 2), certiorari denied, 361 U.S. 875; Cobia v. United States, 384 F. 2d 711 (C.A. 10), certiorari denied, 390 U.S. 986. See and compare United States v. Demko, 385 U.S. 149.

Appellant contends, however, that despite the express language of 5 U.S.C. 757(b), and the consistent holdings of the courts, his Tort Claims Act suit may nonetheless be maintained because the Federal Drivers Act, 28 U.S.C. 2679(b)-(e), assertedly took away a pre-existing remedy against the individual driver, Bruce. But, as we show below, there is no substance to this contention.

The Federal Drivers Act, 28 U.S.C. 2679(b)-(e), was enacted in 1961 to protect Government drivers from the threat and burden of suits and judgments resulting from driving for the Government. See H.Rept. No. 297, 87th Cong., 1st Sess.; S.Rept. No. 736, 87th Cong., 1st Sess.; 107 Cong. Rec. 18,499-18,500, 87th Cong., 1st Sess. The statute accomplishes that Congressional purpose by immunizing individual drivers from personal suits and judgments arising out of driving in the course of their employment, and by limiting the plaintiff to his remedy against the United States, under 28 U.S.C. 1346(b), the Federal Tort Claims Act.

Thus, 28 U.S.C. 2679(b) provides that "[t]he remedy by suit against the United States as provided by section 1346(b) of this title [Federal Tort Claims Act] for damage * * * or * * *

injury * * * resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee * * * whose act * * * gave rise to the claim."

It follows, therefore, that the Drivers Act in effect provides that claims for tort damages arising out of driving in the course of Government employment may not be asserted against the driver individually but must be asserted against the United States under the Federal Tort Claims Act. 4/ And in order to implement that mandate, the Act further provides that actions which are instituted in State courts against Government drivers individually are, upon certification by the Attorney General that the driver was in the scope of his employment, to be removed to the United States district court and are to

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4/ The General Services Administration, which was a primary sponsor of the bill, indicated that different approaches had been considered with respect to protecting Government drivers. See H. Rept. No. 297, supra, at pp. 7-8. One approach would have provided that the Government pay judgments entered against drivers individually, while another would have provided that the Government procure insurance to cover its employees' Government driving. These proposals were rejected however, in favor of the existing type of statute in part because the former entailed greater expense and difficulty of administration. Thus, the letter from the GSA noted that "[b]y this amendment the handling of suits against the employee driver personally would be fitted into the existing mechanism afforded by the Federal Tort Claims Act * * *" Id. at p. 8.

proceed as actions against the United States under the Federal Tort Claims Act. 28 U.S.C. 2679(d).

Under the Drivers Act, therefore, the settled rules of the Federal Tort Claims Act apply, and as noted above, the law is well settled that federal employees who are eligible for benefits under the F.E.C.A. cannot, in view of the express exclusivity provision of the F.E.C.A., maintain an action under the Federal Tort Claims Act.

The applicability of the exclusivity provision of the F.E.C.A., as those in all other workmen's compensation acts, does not turn on whether a more generous tort recovery would be available against the employer or another employee in a particular case. Congress intended the F.E.C.A. to wholly replace any tort liability of the United States to covered employees; in return the employees receive a fair substitute by way of the administrative compensation remedy "which would afford employees and their dependents a planned and substantial protection." S.Rept. No. 836, 81st Cong., 1st Sess., p. 23.[5/]

5/ The Supreme Court has noted the clear advantages to a claimant of the comprehensive system of benefit payments under the Act. Johansen v. United States, 343 U.S. at 440-441. Compare Feres v. United States, 340 U.S. 135, 145. In addition, we point out that benefit payments under the F.E.C.A. may be quite substantial. Under the Act, benefits up to approximately $1500 per month may be payable during an employee's disability. 5 U.S.C. (Supp. II) Appendix 756(c).

Appellant's reliance upon Jackson v. Lykes Bros. Steamship Co., 386 U.S. 731 and Reed v. Yaka, 373 U.S. 410, for the proposition that the exclusivity provision of the F.E.C.A. shall not apply here, is entirely misplaced. Aside from the fact that those cases involve considerations peculiar to the law of admiralty, it is clear that they deal solely with the rights of maritime employees as against private employers. With respect to the rights of the maritime employees of the United States, the Supreme Court held in both Johansen v. United States, supra, and Patterson v. United States, supra, that the F.E.C.A. was the sole remedy available against the United States. The continuing validity of the Johansen and Patterson decisions was recently reaffirmed by the Supreme Court in Amell v. United States, 384 U.S. 158 at 160-161 and again in United States v. Demko, supra, 385 U.S. at 151-152. It is particularly significant that in Aho v. United States, 374 F. 2d 885 (C.A. 5), certiorari denied, 389 U.S. 930, the Fifth Circuit rejected the precise contention now reasserted here and flatly held that Reed v. Yaka, supra, did not apply to government seamen, and that such seamen could have no recovery against the United States in addition to the benefits provided by F.E.C.A.

Moreover, there is nothing in Jackson v. Lykes Bros. Steamship Co., supra, which indicates that the Supreme Court was overruling settled rules under the F.E.C.A. On the contrary, that case, as did Reed v. Yaka, supra, dealt solely with the

liability of a private shipowner. Thus even in the area of maritime law, Reed and Jackson have no bearing on the exclusivity of the liability of the United States under the F.E.C.A., and they clearly have no application here.

It is clear, therefore, the district court correctly held that Noga could not maintain his Tort Claims Act suit against the United States in view of the express bar of the F.E.C.A.[6/] In that connection, we wish to call to the attention of the Court that three other district courts have recently held that where a Government employee, who is covered by the F.E.C.A., is injured by a Government driver in the scope of his Government employment, the effect of the Drivers Act and the F.E.C.A. is to limit the injured person to his remedy against the United States for administrative compensation benefits. Beechwood v. United States, 264 F. Supp. 926 (D. Mont.); Van Houten v. Ralls, et al., D. Nev., Civil No. 1911-N, decided August 31, 1967, pending on appeal to this Court, No. 22,356;[7/] Vantrease v. United States, W.D. Mich., Civil Action No. 5469, decided

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6/ Contra: Gilliam v. United States, 264 F. Supp. 7 (E.D. Ky.), which we think was wrongly decided and which is pending on our appeal to the United States Court of Appeals for the Sixth Circuit, No. 18,644.

7/ A copy of the Van Houten opinion is reproduced in the Appendix to this brief, infra, pp. 1a-5a. See also Judge Thompso earlier opinion reproduced in the Record pp. 61-71.

August 29, 1967, pending on appeal, C. A. 6, No. 18222.[8/]

Those cases, therefore, attest still further to the correctness of the district court's decision that in no event can Noga, who is eligible for and has received benefits under the F.E.C.A., recover damages from the United States under the Federal Tort Claims Act, and that the Drivers Act in no way affects that result.[9]

8/ A copy of the Vantrease opinion is reproduced, infra, in the Appendix to our brief, pp. 6a-16a.

The Beechwood and Vantrease cases involve situations where the injured person sued the Government driver individually and where the United States removed the cases pursuant to subsection (d) of the Drivers Act for proceedings in the district court under the Tort Claims Act. In both instances the courts accepted our position that the bar of the F.E.C.A. required a dismissal of the action under the Tort Claims Act, and that the Drivers Act did not permit the injured person to proceed further against the driver. In the two Van Houten cases, Judge Thompson first held that a Tort Claims Act suit brought directly in the district court would not lie in view of the F.E.C.A. A second suit brought against the driver in the state court was removed to the district court and Judge Thompson has further held that the Drivers Act precludes recovery against the driver individually. See Appendix, infra, pp. 1a-~~16a~~5a. The second decision in Van Houten, as we noted above, is now on appeal to this Court.

9/ Appellant suggests (Br. 21-22) that a holding that his pre-existing tort recovery is replaced by the F.E.C.A. would violate due process because he would not receive a "substantial and effective equivalent" in place of his more lucrative tort remedy, relying upon Richmond Screw Anchor Co. v. United States, 275 U.S. 331.

In the first place, however, it appears that such contention is premature. The only effect of the judgment in this case is to deny appellant relief against the United States under the Tort Claims Act. It still remains to be seen whether in fact a tort remedy is available against Bruce.
(continued on next page)

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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JUNE 1968.

9/ continued:

In any event, such constitutional argument is without foundation. Whatever considerations may be present in the area of patent infringement, with which the Richmond case was concerned, the Supreme Court has long ago held that due process is not violated by a statute which replaces a common law tort recovery with workmen's compensation benefits. New York Central R. R. Co. v. White, 243 U.S. 188, 197-202. Indeed, the Supreme Court has, since the Richmond case, made it clear that "the Constitution does not forbid * * * the abolition of old * * * [rights] recognized by the common law, to attain a permissible leglislative object". Silver v. Silver, 280 U.S. 117, 122. See Nistendirk v. McGee, 225 F. Supp. 881 (W.D. Mo.) (upholds constitutionality of the Drivers Act).

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

William Kanter

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AFFIDAVIT OF SERVICE

DISTRICT OF COLUMBIA)
) ss.
CITY OF WASHINGTON)

WILLIAM KANTER, being first duly sworn, deposes and says:

That on June 21, 1968, he caused three copies of the foregoing brief for appellee to be served by air mail, postage prepaid, upon counsel for appellant:

James D. Mart, Esquire
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William Kanter

WILLIAM KANTER
Attorney,
Department of Justice,
Washington, D.C.

Subscribed and sworn to before me
this 21st day of June 1968.

[SEAL]

Angeline Johns

NOTARY PUBLIC

My Commission expires April 14, 1972.

A P P E N D I X

F I L E D

SEP 1 1967

OLIVER F. PRATT Clerk
U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

---oOo---

OHN C. VAN HOUTEN,

Plaintiff,

vs.

AY ARTHUR RALLS and GER-
LD L. BYINGTON,

Defendants.

Civil No. 1911-N

D E C I S I O N

This is an action for personal injuries arising out of a
otor vehicle collision brought by John C. Van Houten, a federal
mployee acting within the scope of his employment, against Roy[sic]
rthur Ralls and Gerald L. Byington, federal employees acting
ithin the scope of their employment. The suit was brought in
he Seventh Judicial District Court of the State of Nevada, in
nd for the County of White Pine, and was removed to this Court
s an action within the scope of 28 U.S.C. 2679. Plaintiff has
oved to remand the case to the state court, and the United

States Attorney has moved to dismiss the action as one against the United States under 28 U.S.C. 2679(b) and 28 U.S.C. 1346(b) which is precluded as to this plaintiff because his exclusive remedy lies under the Federal Employees Compensation Act, 5 U.S.C. 757(b).

In a companion action (John C. Van Houten v. Ray Arthur Ralls, Gerald L. Byington and the United States of America, Docket No. 1838), brought in this Court under the Federal Tort Claims Act, this Court, on January 6, 1967, dismissed the action The Court then concluded that plaintiff's sole remedy against the United States was under the Federal Employees Compensation Act and that the Court had no jurisdiction of the action against the individual defendants absent diversity of citizenship. The Court expressed the opinion, however, that inasmuch as a remedy against the United States was not available to plaintiff under the Federal Tort Claims Act, his suit did not fall within the purview of 28 U.S.C. 2679 and an action against the individuals was not barred. The present motions bring this problem before the Court for reconsideration.

The issue is one of federal law which should be determined by the federal rather than the state courts. If this Court should grant the motion to remand, a non-appealable order, the defense that the remedy by suit against the United States is exclusive [28 U.S.C. 2679(b)] would not be removed from the case (Cf. Fancher v. Baker, 240 Ark. 288, 399 S. W. 2d 280) and the Nevada Courts would be required to resolve this arguable problem

of interpretation of federal statutes. On the other hand, if this Court grants the motion to dismiss, the Court of Appeals for the Ninth Circuit may be called upon to make a definitive ruling for this Circuit.

Upon reconsideration, the Court has concluded that the motion to dismiss should be granted. The viewpoint expressed in the opinion filed in the companion case still has some merit as an argument under standard canons of statutory interpretation. But the net result is to attribute to Congress an intent when it adopted the Government Drivers Act amendment to the Federal Tort Claims Act which affronts common sense. Under that interpretation, a federal employee driver of a motor vehicle in the course of his employment is normally exonerated from personal liability, but not so if the injured person is another federal employee who has a claim for compensation under the Federal Employees Compensation Act. An intent to engraft such an incongruous exception to the general immunity from personal liability cannot be found in the language of the statute nor in the legislative history.

The Court's earlier viewpoint was founded on the statutory language, "the remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death * * * shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate."

The Court now has concluded that this plaintiff, although a federal employee having rights under the Federal Employees Compensation Act, is still a person to whom the statutory language, "the remedy against the United States provided by section 1346(b)" applies. Section 1346(b) encompasses "claims * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." This is exactly such a case, and there is no provision of the Federal Tort Claims Act which would disqualify Van Houten as a claimant or plaintiff thereunder. Congress, in the Government Drivers Act, 28 U.S.C. 2679(b), incorporated Section 1346(b) by reference as a description of the class of cases to which the exclusivity of the remedy against the Government and the immunization of the individual federal employee from liability apply. The fact that for some extraneous reason the particular plaintiff cannot successfully maintain suit under the Federal Tort Claims Act should not change the result. So, the fact that Van Houten, as a federal employee, has as his exclusive remedy his claim under the Federal Employees Compensation Act does not remove his case from the class of cases or claims described in Section 1346(b); that is to say, his is a claim for personal injuries caused by a federal employee under

circumstances where a private person would be liable to respond in damages under Nevada law. See: Hoch v. Carter (S.D. N.Y. 1965), 242 F. Supp. 863; Fancher v. Baker, supra; Perez v. United States (S.D. N.Y. 1963), 218 F. Supp. 571; Uptagrafft v. United States (4th Cir. 1963), 315 F. 2d 200; Adams v. United States (S.D. Ill. 1965), 241 F. Supp. 383.

The action will be dismissed. The basic intent of Congress to protect a Government driver from exposure to personal liability cannot be carried out by the statutory interpretation developed in the companion case. Presumably this demonstration of schizophrenia in the judicial process will prove frustrating to the plaintiff in this case, but having been persuaded that the earlier decision was wrong, the fairest course we can take at this point is to say so.

An order will be entered accordingly.

Dated: August 31, 1967.

BRUCE R. THOMPSON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

SAMMY J. VANTREASE, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	)	Civil Action No. 5469

Before HON. W. WALLACE KENT, Chief Judge.

Kalamazoo, Michigan, August 29, 1967.

OPINION OF THE COURT

ANTOINETTE DUDA
Official Court Reporter
418 Federal Building
Grand Rapids, Michigan

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

SAMMY J. VANTREASE, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	)	Civil Action No. 5469

Before HON. W. WALLACE KENT, Chief Judge.

Kalamazoo, Michigan, August 29, 1967.

APPEARANCES:

MARCUS, McCROSKEY, LIBNER, REAMON, WILLIAMS & DILLEY, Grand Rapids, Michigan, By MR. J. WALTER BROCK,

on behalf of the Plaintiff;

MR. JAMES W. EARDLEY, Assistant United States Attorney,

on behalf of the Defendant.

THE COURT: This is the government's motion for a summary judgment, on the ground that the suit by the plaintiff is barred by the provisions of Title 28, U.S.C.A., Section 2679(b).

The case could be disposed of summarily by pointing out that in the file there appear the following: A complaint filed in the Circuit Court for Calhoun County; the usual papers filed on removal; a motion for substitution, which has been previously decided; an answer filed by the United States, which was substituted for the defendant Dorr Cameron; and a motion for judgment on the pleadings and a motion for summary judgment. There is no motion for remand, although the point was made during the course of the arguments on the motion for substitution of defendants.

Briefly, the cause of action arises out of an occurrence on December 8, 1964, when the plaintiff was injured while working as a Post Office employee when struck by an automobile driven by Dorr Cameron, a Post Office employee driving in the scope of his employment.

The case was removed, and the government substituted, under the provisions of Section 2679(d) of Title 28.

The government's motion is based on the

theory that Section 2679(b) of the statute makes the remedy against the United States the exclusive remedy; that there are no rights against anyone else; that the plaintiff has been paid compensation under the Federal Employees' Compensation Act, 5 U.S.C.A., Section 757, which in Section 757(b) provides that government employees eligible for compensation may not sue their employer, the United States.

This case has been before other courts. In Beechwood v. United States, 264 F.Supp. 926, a decision of the District Court in Montana, on almost exactly the same facts, the court said:

> "The plaintiff's remedy against the United States is limited to recovery under the Federal Employees' Compensation Act and the United States' motion for summary judgment should therefore be granted. The case is dismissed and not remanded because plaintiff has no remedy against Selma Meathrel." Citing the statute. And paraphrasing: The act "insulates a federal employee from liability for injuries to another arising out of motor vehicle accidents happening in the course of federal employment."

The government has called to the Court's

attention a decision in the Northern District of California in 1967, not yet reported: Noga v. United States. A copy of the opinion is attached to the government's brief. And quoting from the opinion:

> Plaintiff "argues as follows: * * * To preclude plaintiff from a remedy after the passage of the Federal Drivers Act would be to impute to Congressional action an intent, admittedly absent, to cut off completely the remedy he previously had because he is fortuitously injured in a motor vehicle accident.
>
> "The Court does not agree with plaintiff's argument. What Congress would or would not have done if it had considered a particular problem is a profitless line of inquiry when general statutes can be found which set forth the law clearly. Section 2679(b) of 28 U.S.C. provides that the exclusive remedy of a person injured by the government employee driver of a motor vehicle is against the United States. This statute eliminates plaintiff's remedy against the driver, individually, which he had before 1961." Citing the Workmen's Comp. Act: "...provides that the exclusive remedy against the United States for an employee for injuries sustained in the course of his

employment is under the Federal Employee's Compensation Act. This statute precludes an employee from suing the United States under the Federal Tort Claims Act for injuries sustained while in the scope of his employment. Together these two statutes provide that plaintiff in the instant case has no cause of action against the United States other than under the Federal Employees' Compensation Act."

And it should be pointed out that the plaintiff in this case does not claim any cause of action against the Government of the United States. The plaintiff concedes that he has no cause of action against the United States, but claims that he should be permitted to pursue his common law remedies against Dorr Cameron, who was the defendant in the state court action, and calls attention to the opinion of Judge Mac Swinford, of the Eastern District of Kentucky, in Gilliam v. United States, 264 F. Supp. 7.

Judge Swinford reached the conclusion, in the reported case as well as in an earlier unreported decision, that if Congress had intended to abolish the right to sue, it would have expressly indicated so, meaning the right to sue the individual doing the injury.

We must respectfully disagree with Judge Swinford.

In the legislative history relating to this statute, and from the language of the statute, itself, it appears obvious that the intent of The Congress was to insulate government employees from suit where they might otherwise be liable in a common law action for negligence if such negligence was in the course of driving an automobile in the scope of their employment by the United States.

The government has not passed any other statute which has been called to this Court's attention which would insulate a government employee from suit for his negligent acts. The government has very definitely excluded suits by any person under the provisions of Section 2679(b) of Title 28, under the circumstances set forth in that section.

The sole cause of action where a driver driving in the scope of his employment as a government employee injures another person is by suit against the United States. As conceded by the plaintiff here, he cannot maintain a suit against the United States.

This Court is satisfied that, as pointed out by the California decision, indulging in speculation as to what The Congress would or would not have done if it had considered a specific problem which is now before the Court

is a profitless line of inquiry. Congressional attitudes are not that predictable.

The purpose of The Congress was very clear, and is still clear. The purpose of The Congress in enacting the statute as it did in 1961 was to prevent suits against drivers of government vehicles, or vehicles operated for the government, when the employee was operating within the course of his employment.

In Judge Mac Swinford's opinion, he cites with approval and, in fact, may rely upon Marion v. United States, 214 F.Supp. 320.

As pointed out by counsel in this case, the Marion case has been cited as authority for a contrary result than that reached in California and Montana, in the Noga case in California and the Beechwood case in Montana.

However, an examination of the Marion case makes it obvious that the point which is now before the Court was not before the Court in the District Court for Maryland in the Marion case.

In that case, the accident in question occurred on August 27, 1959. On August 25, 1961, plaintiff instituted a suit under the Federal Tort Claims Act. The injured person was a Federal employee; the driver of the

vehicle inflicting the injury was driving a privately-owned vehicle, but driving in the course of his employment as a government employee. The Court granted summary judgment as to the United States, and let the suit stand as to the co-employee defendant.

In reality, the Marion case is of no authority or consequence in the consideration of the rights of the parties here, since it appears that Section 2679(b), making the suit against the government the exclusive remedy, was embodied in Public Law 87-258 of the Public Laws enacted in 1961, and it was provided, in Section 2 of the act, without reading in detail:

> "The amendments made by this act," which includes Section (b), "shall be deemed to be in effect six months after September 21, 1961, but any rights or liabilities then existing shall not be affected."

In the Marion case, the claim came into existence in 1959; suit was instituted before the effective date of the statute. So while the motion was decided after the effective date, it doesn't make any difference.

So the government's motion for summary judgment is granted for the reasons herein stated.

And you may present an appropriate order,

Mr. Eardley.

MR. EARDLEY: Thank you, Your Honor.

THE COURT: All right.

MR. BROCK: One further thing, Your Honor.

If we submit a motion to remand, could we submit that along with the order denying the motion to remand, all at the same time, and not have further oral arguments and briefs?

THE COURT: Certainly. I don't know any reason why not.

MR. BROCK: That would just keep the record straight.

THE COURT: Yes. That is not the reason for the Court's decision, although it might be a meritorious reason. That is not the reason for it. I would rather decide it on what I consider to be the merits of the controversy rather than the technical question.

MR. BROCK: I understand that, Your Honor.

THE COURT: So you are at perfect liberty to include in the file, before the order is prepared, a motion to remand, and include in the order, or Mr. Eardley can include in the order, a denial of the motion to remand.

MR. BROCK: Fine. Thank you, Your Honor.

THE COURT: All right. We will recess.

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IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

I, Antoinette Duda, Official Court Reporter, do hereby certify that the foregoing is a full, true and correct transcript of the opinion of the court in this matter, according to my original stenographic notes.

Official Court Reporter
United States District Court
Western District of Michigan